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IN THE SUPREME COURT
OF THE
STATE OF UTAH

ALVIN A. MAWSON,
Plaintiff and Appellant,

vs.

J. G. INVESTMENT CO.,
Defendant and Respondent.

Case No.

11658

APPELLANT'S BRIEF

Appeal from a judgment of the Third District
of Salt Lake County, Honorable Marcelus
Judge.

CARVEL R. SHAFFER
of and for
BURTON, BLONQUIST
CAHOON, MATHESON
& SHAFFER
Suite 640, Kennecott Building
Salt Lake City, Utah 84101
*Attorneys for Plaintiff
and Appellant*

LOTHAIRE R. RICH
16 East Stratford Ave.
Salt Lake City, Utah
*Attorney for Defendant
and Respondent*

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**IN THE SUPREME COURT
OF THE
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ALVIN A. MAWSON,
Plaintiff and Appellant,

vs.

J. G. INVESTMENT CO.,
Defendant and Respondent.

Case No.
11658

STATEMENT OF CASE

This is an action by appellant, hereinafter referred to as "plaintiff," against J. G. Investment Corporation, hereinafter referred to as "defendant," for an order requiring defendant to remove obstructions placed in a roadway.

DISPOSITION AT TRIAL COURT

The case was tried before the Honorable Marcellus K. Snow and after the trial the Court made Findings of Fact and Conclusions of Law stating that plaintiff had no right, title or interest in and to the roadway.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a reversal of the trial court's decision and an order requiring defendant to remove the obstructions in the roadway.

STATEMENT OF FACTS

Plaintiff, on or about April 29, 1959, was named as a grantee in an administrator's deed executed by Donald Thomas Phillips, administrator of the estate of Leo Thomas Phillips, deceased. (R4) The Habendum clause stated "an undivided 1/5 interest in and to the following described property to be used as a roadway, to-wit:

Commencing at a point on the East side of Third East Street, Salt Lake County, State of Utah, which is South 0°16' West 444.2 feet from the Northwest corner of Lot 9, Block 18, Ten Acre Plat "A," Big Field Survey, Salt Lake County, State of Utah, and extending thence North 0°16' East 33.1 feet, thence North 89°51' East 767.35 feet, thence South 0°16' West 33.1 feet, thence South 89°51' West 767.35 feet to the place of beginning.

The above-described property is the property which is the subject of this action. At the time the plaintiff acquired the one-fifth interest in the above-described property he also acquired title to other parcels of property which abutted this particular property. These properties are described in Exhibit P-2. (R4)

Defendant subsequently acquired a four-fifths interest in the property which is the subject of this action. Defendant has obstructed plaintiff's use of the property. Exhibit P-3 (R9) Exhibit P-4 (R10)

PLAINTIFF'S POSITION

The trial court's decision should be reversed and the Court should order that plaintiff acquired a fee title interest in the roadway on the following ground:

Plaintiff's uncontroverted evidence at trial clearly shows that he acquired an undivided one-fifth interest in and to the property which is the subject matter of this action, and that he has never conveyed the fee to another party.

ARGUMENT

POINT I

PLAINTIFF ACQUIRED AN UNDIVIDED ONE-FIFTH INTEREST IN AND TO THE FEE TITLE OF THE PROPERTY.

Alfred W. Phillips, a widower, conveyed by warranty deed dated January 8, 1931, and recorded October 3, 1932, as Entry No. 702686 in Book 108 at Pages 265 and 266 in the office of the Salt Lake County Recorder the property which is the subject matter of this action to Leo Thomas Phillips. The warranty deed is shown in the abstract which is marked Exhibit P-12 on page 14. (R14) The warranty deed described the property as a separate parcel as follows:

An undivided one-fifth interest in and to the following described property to be used as a roadway, to-wit: Commencing at a point on the East side of Third East Street, Salt Lake County, State of Utah, which is South 0°16' West 442.2 feet from the Northwest corner of Lot 9, Block 18, Ten Acre Plat "A," Big Field Survey, Salt Lake County, State of Utah, and extending thence North 0°16' East 33.1 feet; thence North 89°51' East 767.35 feet; thence South 0°16' West 33.1 feet; thence South 89°51' West 767.35 feet to the point of beginning.

Plaintiff submits that when title was conveyed to Leo Thomas Phillips by Alfred W. Phillips the fee title passed to Leo Thomas Phillips.

Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights, and privileges

thereunder belonging, with covenants from the grantor, his heirs and personal representatives, that he is lawfully seized of the premises; that he has good right to convey the same, that he guarantees the grantor, his heirs and assigns in the quiet possession thereof; . . . 57-1-12, U.C.A. (1953)

The property was next conveyed to Alvin A. Mawson by administrator's deed executed on or about April 29, 1959, and recorded May 22, 1959, as Entry No. 1654655 in Book 1615 at Page 302 in the Salt Lake County Recorder's office. The administrator's deed is marked Exhibit P-2. (R4) The administrator's deed conveys the property of Leo Thomas Phillips, deceased, to plaintiff. The property is described in four tracts. The habendum clause states under tract four "an undivided one-fifth interest in and to the following described property to be used as a roadway to-wit." The property is then described.

After confirmation conveyances must be executed to the purchaser by the executor or administrator, conveying all the right, title, interest and estate of the decedent in the premises at the time of his death §75-10-17, U.C.A. (1953)

When a deed is executed by the administrator of an estate it passes all title of the decedent. Therefore, plaintiff submits that he received fee title from the administrator of the estate to the subject property of this action.

When the administrator's deed was executed by the estate of Leo Thomas Phillips by Donald Thomas Phillips, the duly appointed administrator, plaintiff became a co-tenant to an undivided one-fifth interest in and to the property as a tenant in common with the other parties.

The term "co-tenancy" refers to the ownership of property by two or more persons in such manner that they have an undivided possession or right to possession, but several freeholds, and as thus defined it includes joint tenancies, tenancies in common, and estate by the entirety. 20 Am. Jur. 2d, 92 *Co-Tenancy and Joint Ownership* §1,

"Tenancy in common" may be defined as the character of tenancy whereby two or more persons are entitled to lands in such manner that they have an undivided possession 20 Am. Jur. 2d, 115, *Co-Tenancy and Joint Ownership*, §22,

Unlike joint tenancy, tenancy in common is characterized by a single essential unity — that of possession, or of the right to possession, of the common property, if such unity exists, there is a tenancy in common irrespective of the concurrence of any other unities, and if it does not exist the estate is not a tenancy in common. 20 Am. Jur. 2d, 116 *Co-Tenancy and Joint Ownership*, §23.

When title was conveyed to plaintiff it was conveyed as a separate and distinct tract or parcel of property. It was not conveyed as an easement or right of way or a reservation of title in the grantors.

POINT II

PLAINTIFF HAS RETAINED FEE TITLE TO THE PROPERTY WHICH IS THE SUBJECT MATTER OF THIS ACTION.

Plaintiff executed conveyances to some of the other tracts of ground he received under the administrator's deed. Exhibit P-2 (R4) However, he has never executed a document conveying the fee title to the property as it is described in tract four of the administrator's deed. Exhibit P-2 (R4)

When plaintiff executed a conveyance to these other tracts of ground, the conveyance stated "together with a right of way over the following." Then the legal description of the property was given. Further, when plaintiff conveyed these other parcels of property, a dominant estate was conveyed and plaintiff retained the servient estate. In the case of *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148 (1946), the Supreme Court of Utah held that the "servient estate is the owner of the fee and as such has all the rights of an owner of the fee subject only to the reasonable use of the easement." Plaintiff thereby granted an easement over the property and retained the fee title.

POINT III

PLAINTIFF IS ENTITLED TO POSSESSION AND USE OF THE PROPERTY.

Each tenant in common is entitled equally to share in possession of the entire property, and neith-

er may exclude the other from any part of it. *Zaslow v. Kroenert*, 176 P.2d 129 C.2d 541 (1946).

Though each owner of property in common is entitled to possess and use the whole property and possession of one co-owner is regarded as possession for all, no co-owner is entitled to a possession or usage which excludes for any period of time a like possession or usage by his co-owners. *Krum v. Mal-low*, 137 P.2d 18, 22 C.2d 132 (1943).

A tenant in common is entitled to the use and possession of the common property, subject only to the condition that he may not exclude another co-tenant from like use and possession. In re *Randalls Estate*, 132 P.2d 763, 64 Idaho 629 (1942).

From the above cases a tenant in common clearly has the use of the property along with the other co-owners. Therefore, Mr. Mawson, the plaintiff in this action, is entitled to the use of the property the same as defendant and defendant cannot obstruct the use.

CONCLUSION

Plaintiff owns fee title to the property which is the subject matter of this action. He has granted other persons a right of way over the property, however, he has never conveyed the fee title to another person. Therefore, plaintiff is entitled to the use of the roadway without obstructions.

Respectfully Submitted,

CARVEL R. SHAFFER
of and for
BURTON, BLONQUIST,
CAHOON, MATHESON
& SHAFFER

Attorneys for Plaintiff

Suite 640, Kennecott Building
Salt Lake City, Utah 84111